No. 81-2169

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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SUPREME COURT, U.S.

GILBERT A. HARING, et al., Petitioners;

v.

JOHN FRANKLIN PROSISE, Respondent.

OPPOSITION TO RESPONDENT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT

Preliminary Statement

The following is the response of the petitioners to the respondent's Motion For Leave to File Supplemental Brief After Argument. The motion was received on Monday, May 16, 1983, and the petitioners have attempted to provide a prompt response; printed copies will be provided as quickly as possible. This response opposes the motion, but also, because the case is now under consideration and because of the argument in the motion, addresses briefly the major points in the proffered Supplemental Brief.

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AFTER ARGUMENT

The respondent has moved this Court under Rule 35.6 for permission to file a Supplemental Brief. The petitioner opposes the motion on the following grounds:

1. The essence of the respondent's motion is that he did not realize the significance of the case of Souders v. Gabrielson, Record No. 741124 (Va. Sup. Ct. April 16, 1975), even though it was discussed in the petitioners' "Reply to Opposition to Petition for Writ of Certiorari," "Petitioners' Brief," and petitioners' "Reply Brief to the Brief for Respondent." In that case, the Arlington County Circuit Court, by Judge Charles Russell, held that the plaintiff was collaterally estopped from suing the police officers for damages claiming they used excessive force during their arrest of the plaintiff. The defendants pleaded that "since this action arises from the arrest of the plaintiff on the charge of being drunk in public and the plaintiff's assault upon Officer Gabrielson and since the plaintiff has heretofore admitted being guilty to both of the charges, the plaintiff is estopped in this action from pursuing a claim against Officer Gabrielson and the other defendants arising from the plaintiff's own unlawful conduct." Appendix to "Reply to Opposition to Petition for Writ of Certiorari," at page 9a. The order of the Circuit Court sustained this plea. Id., at 2a-3a. The Virginia Supreme Court denied the plaintiff's Petition for a Writ of Error on April 16, 1975, and expressly stated in its order:

> "[The Petition for Writ of Error] having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court." Id., at page 1a.

The fact that respondent only now appreciate the effect of the Souders case is not a sufficient reason to permit argument by the respondent that could and should have been made earlier.

2. The respondent argues that petitioners have misapplied the Souders case. To support this claim the respondent does not rely upon the order of the trial court, but rather he relies upon the comments from the bench of the trial judge. Contrary to the respondent's protestations in paragraph 6 of his motion, the "holding" of the trial judge in Souders was to sustain the plea of estoppel filed by the defendants. It is this order that the Virginia Supreme Court found to be correct on its merits.

3. Even if this Court now examined the trial court's comments, it would find, as petitioners have consistently argued, that Souders is the Virginia case closest to the issues presented here. In his strenuous effort to distinguish Souders, respondent has in fact shown that in Virginia a trial court can and should decide what issues are or are not precluded by a guilty plea in cases where the admittedly guilty person later sues the arresting officers for civil torts allegedly committed during the arrest. None of the Virginia cases the respondent relies on involve a criminal defendant who later sued the arresting officers. Although the Virginia Supreme Court has, on some occasions, continued to require mutuality, the court, in at least two recent cases, has said it would, in an appropriate case, depart from the rule. See Bates v. Devers, 214 Va. 667, Fn. 7, 202 S.E.2d 917 (1974); Luke Construction Co. v. Simpkins, 223 Va. 387, 291 S.E.2d 264 (1982) (per curiam). The trial judge departed from the rule in Souders and his departure was upheld by the Virginia Supreme Court. Just as the trial judge in Souders examined the factual basis of the criminal conviction to determine what issues were "decided" by the plea, the federal district court judge in the case at bar could examine the factual basis of the respondent's guilty plea to determine if the search at issue in this 1983 action was necessarily decided by the plea. This approach is far preferable to a costly trial on the merits.

4. In his motion, respondent has changed his position on estoppel. Earlier, respondent contended that collateral estoppel could not apply to the case at bar because the validity of the search was never raised in a motion to suppress and, thus, the issue was not "actually litigated" -- an element of collateral estoppel which respondent claims is essential. Now respondent apparently argues at paragraph 6 of his motion that collateral estoppel applies to issues "actually decided," although they might not have been "litigated." Since it is inescapable that Souders involved guilty pleas, respondent must now be admitting that a plea of guilty does necessarily decide certain issues even though the issues were not specifically "litigated."

5. Finally, respondent implies throughout his motion (and in the accompanying Supplemental Brief) that the denial of a petition for a writ of error has no precedential value whatever in Virginia. This is incorrect. In a 1978 booklet entitled "Appellate Advocacy in the Supreme Court of Virginia" co-authored by the Honorable Justice George Cochran of the Virginia Supreme Court and Stuart B. Campbell, the following is said at page 5:

> "If the court finds no reversible error, it shall so state and reject the petition on that ground (§ 8.01-675) [formerly Va. Code § 8-476].... Unlike denial of certiorari by the Supreme Court of the United States, refusal of an appeal by the Supreme Court of Virginia, unless explicitly based on jurisdictional grounds or violation of the Rules of Court, has precedential effect for the order rejecting the petition states that there is no reversible error in the decision of the lower court."

In Stillwell v. Commonwealth, 219 Va. 214, 247 S.E.2d 360 (1978), the court relied upon the earlier denial of a petition for a writ of error. In footnote 4, the court compared the weight to be given its denial of a petition for a writ of error to the Supreme Court's dismissal of a petition for appeal for want of a substantial federal question. Both are treated as decisions on the merits. See also Saunders v. Reynolds, 214 Va. 697, 204 S.E.2d 421 (1974). In his accompanying Supplemental Brief, respondent mistakenly relies upon the Town of South Hill v. Allen, 177 Va. 154, 12 S.E.2d 770 (1941) and Brunswick County v. Peebles & Purdy Co., 138 Va. 348, 122 S.E. 424 (1924), for the proposition that the denial of a petition for writ of error has "no precedential effect." In the Allen case, the court noted that the issue under consideration had been one of seventeen errors assigned in an earlier case where the petition for a writ of error was denied. The court noted that certain evidence was available in the earlier case that might have supported the denial of the writ. Because of

this, the earlier case was "not controlling" under stare decisis. In the Peebles case, the court noted that the earlier refusal of a writ of error in a case involving a similar issue "did not decide the question involved in any other case." The court stated this in dicta after it found that "it was error to refuse the writ in that case" and that the attorney who presented the earlier petition admitted that he was at fault for not more explicitly setting out the question involved in the earlier case. These two cases do not mean that as a general proposition a denial of a petition for appeal has no precedential value; rather the cases only show that just as in any case law situation, a prior case may or may not be persuasive under stare decisis based upon the circumstances of the earlier decision.

CONCLUSION

In short, the argument sought to be made in the motion and in the Supplemental Brief is not substantially new. Indeed, many points are inconsistent with the positions respondent argued earlier. For example, in his conclusion to the proffered Supplemental Brief, respondent argues that Souders is actually in conformity to the settled law in Virginia. In his brief on the merits at page 14, respondent states flatly: "Virginia Law Gives No Preclusive Effect to Criminal Convictions in Subsequent Civil Actions." In denying the petition for appeal in Souders the Virginia Supreme Court recognized that estoppel effect will be given to a criminal conviction where the conviction is based on a guilty plea. Souders is the closest Virginia case on point and it is entitled to precedential weight.

The flat rule of non-preclusion which the Fourth Circuit adopted conflicts with the Souders decision. The trial judge's action in examining the factual basis for the plea in Souders, which was approved by the Virginia Supreme Court, is directly at odds with the Fourth Circuit's position that in the run of 1983 cases it isn't worth the effort to try and decide what issues provided "adequate incentive to litigate" and hence were decided by the plea. A decision by this Court that a person who is convicted by a guilty plea cannot claim that the search which produced the essential evidence of the crime was unconstitutional is compatible with Virginia law. Certainly a flexible rule which allows the trial court to decide what issues should be precluded and not the Fourth Circuit's flat rule of non-preclusion is conformable to the principles of Virginia law.

The motion of the respondent has no merit and should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Opposition to Respondent's Motion For Leave to File Supplemental Brief After Argument was mailed, postage prepaid, to Norman A. Townsend, Esquire, P.O. Box 146, Alexandria, Virginia 22313, on this 19th day of May, 1983.

Charles G. Flinn

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